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Malaysian International Trading Corp (Japan) Sdn Bhd v Bentini SPA & Ors

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO D6–22–644 OF 2007
MARY LIM J
7 MAY 2013

Partnership — Existence of partnership — Dispute as to existence — Intention, conduct and action of parties — Buy and sell agreement entered into by parties — Default in obligations to make payments to plaintiff under buy agreements — Whether there was partnership agreement — Whether constituted partnership — Joint venture agreement — Whether elements to establish partnership between parties proven — Whether loss proven

The first and second defendants formed a consortium known as NF Energy-Bentini JV ('the JV') which successfully secured an engineering, procurement, construction and commissioning contract of pumping facilities from Petrodar ('the project'). A letter of award was issued by Petrodar to the JV for the project. However, the JV did not have sufficient letter of credit facilities. The plaintiff agreed with the JV that the plaintiff would carry out the contract for the supply and delivery of main equipment, machinery and bulk material to NF Energy-Bentini JV for EPCC pumping facilities in Sudan ('the procurement agreement'). The plaintiff and the JV next executed 45 agreements whereby the JV sold equipment to the plaintiff ('the sell agreements'); and 45 agreements whereby the JV bought the same equipment from the plaintiff ('the buy agreements'). The sell and buy agreements allowed the plaintiff to provide the JV with the necessary financing. The JV then defaulted in their obligations to make payments to the plaintiff under the buy agreements. Upon letters of demand issued and letters exchanged between the plaintiff and the JV, the JV was said to have admitted to the claim. However, the debt, which stood at EUR38,734,400.20 together with interest, remained unsatisfied. In the present claim, the plaintiff averred that the first defendant was liable for the debts due under the sell and buy agreements by virtue of its partnership with the second defendant in the JV. If that partnership had been terminated or dissolved as alleged by the first defendant, the plaintiff maintained that the first defendant nevertheless knowingly suffered and continued to allow the second defendant to hold the first defendant out as part of the partnership. The issues that arose for the court's determination were: (i) whether the first defendant were a party to the procurement agreement and the 45 sell and buy agreements; (ii) was the first defendant in a partnership with the second defendant at the material time; and (iii) whether the plaintiff established and proved its loss?

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Held, allowing the claim with costs of RM200,000:

(1) The court was entitled to infer that the first defendant was not disputing that the second defendant was indeed the authorised signatory of the parties. The second defendant was not obliged to inform the first defendant of its acts done on behalf of the JV. The first defendant could not cherry pick those clauses or terms that it feels best suits its arguments; while at the same time, ignore the rest of the clauses that glaringly tell their claim. The fact that the first defendant did not physically put pen to paper along the dotted line was irrelevant, so long as the representative authorised to do so did. Here, the second defendant had signed for the JV. The first defendant was therefore a party to the agreements made with the plaintiff and it was bound under those agreements (see paras 157–159).

(2) There were indications of the confidence and arrangements made by the first defendant with its other partners. Given that the JV never informed Petrodar at any time of its internal changes or alert the plaintiff of the same when contracting with the plaintiff, the fact that the plaintiff liaised only with the second defendant and with certain persons within the second defendant did not detract from the conclusion that the JV subsisted as a partnership comprising the first and second defendants (see para 167).

(3) There was ample evidence to prove that the first defendant was indeed a partner and a party to the agreements made with the plaintiff. The agreements for the procurement of the necessary equipment that the JV needed were undoubtedly used towards the successful completion of the project. The elements for finding the existence of a partnership were satisfied. The parties had a relation in this JV where they had a business in common, namely the project and that business was with a view of profit. That position never changed whether contracting with Petrodar or the plaintiff (see paras 176–177).

(4) The transactions entered were not money lending transactions at all as the elements spelt out in s 2 of the Moneylenders Act 1951 were absent. The construction and interpretation was also apparent from the definition of 'moneylender' in s 2 of the Act. The definition was definitive in its interpretation of a moneylender, that it 'means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him'. There is therefore a need for there to be a lender and a borrower.There was no money lending activity at all. The plaintiff was not in the business of money lending. It was a company involved in procurement activities (see paras 180 & 185–186).

(5) It could not be denied that the real and true nature of the Consortium of Bentini-NF Energy JV was that of a partnership. The partners came

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together for the single and common business of securing the Petrodar project and to profit from such a business. The personal attendance by such senior personnel of the first defendant throughout the relation with the second defendant was testimony of that truth. That relation endured despite the changes in management and financial details as the common business remained the same (see para 199).

[Bahasa Malaysia summary

Defendan pertama dan kedua telah membentuk sebuah konsortium dikenali sebagai NF Energy-Bentini JV ('JV') yang mana telah berjaya mendapat kontrak kejuruteraan, perolehan, pembinaan dan pentauliahan kemudahan pengepaman daripada Petrodar ('projek tersebut'). Surat award telah dikeluarkan oleh Petrodar kepada JV untuk projek tersebut. Walau bagaimanapun, JV tidak mempunyai surat kemudahan kredit yang mencukupi. Plaintif bersetuju dengan JV bahawa plaintif akan menjalankan kontrak untuk bekalan dan penghantaran peralatan utama, jentera dan bahan pukal kepada NF Energy-Bentini JV untuk kemudahan pengepaman EPCC di Sudan ('perjanjian perolehan'). Plaintif dan JV kemudiannya menandatangani 45 perjanjian yang mana JV telah menjual peralatan kepada plaintif ('perjanjian-perjanjian jualan'); dan 45 perjanjian yang mana JV telah membeli peralatan yang sama dari plaintif ('perjanjian-perjanjian belian'). Perjanjian-perjanjian belian dan jualan membenarkan plaintif untuk memberikan JV kemudahan kewangan yang sepatutnya. JV kemudian gagal dalam tanggungjawab mereka untuk membuat bayaran kepada plaintif di bawah perjanjian belian. Apabila surat-surat tuntutan dikeluarkan dan surat-surat bertukar tangan antara plaintif dan JV, JV dikatakan telah mengakui tuntutan tersebut. Walau bagaimanapun, hutang tersebut, iaitu EUR38,734,400.20 bersama dengan faedah, masih tidak dipenuhi. Dalam tuntutan itu, plaintif menegaskan bahawa defendan pertama bertanggungan untuk hutang piutang di bawah perjanjian-perjanjian jualan dan belian menurut perkongsiannya dengan defendan kedua di dalam JV. Sekiranya perkongsian tersebut telah dibatalkan atau dibubarkan seperti yang didakwa oleh defendan pertama, plaintif menegaskan bahawa defendan pertama dengan sengaja membiarkan dan terus membenarkan defendan kedua untuk menjadikan defendan pertama sebagai sebahagian daripada perkongsian. Isu-isu yang timbul untuk penentuan mahkamah adalah: (i) sama ada defendan pertama adalah pihak kepada perjanjian perolehan dan 45 perjanjian jual dan beli; (ii) adakah defendan pertama di dalam perkongsian dengan defendan kedua pada masa matan; dan (iii) sama ada plaintif telah memastikan dan membuktikan kerugiannya?

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM200,000:

(1) Mahkamah berhak untuk menyimpulkan bahawa defendan pertama tidak mempertikaikan bahawa defendan kedua sememangnya

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penandatangan yang diberi kuasa bagi pihak-pihak tersebut. Defendan kedua tidak perlu memaklumkan kepada defendan pertama akan tindakan yang telah dilakukan bagi pihak JV. Defendan pertama tidak seharusnya memilih klausa-klausa atau terma-terma tersebut yang mana dirasakan paling sesuai untuk hujahannya; dan pada masa yang sama, tidak mengendahkan klausa selebihnya yang mana dengan jelas memberitahu tuntutan mereka. Fakta bahawa defendan pertama tidak secara fizikal menandatangan adalah tidak relevan, asalkan wakil yang diberi kuasa telah menandatangan. Di sini, defendan kedua telah menandatangani untuk JV. Defendan pertama oleh itu adalah pihak kepada perjanjian yang dibuat dengan plaintif dan adalah terikat di bawah perjanjian tersebut (lihat perenggan 157–159).

(2) Ada ciri-ciri perkongsian terhad dan hubungan yang dibuat oleh defendan pertama dengan rakan kongsi yang lain. Memandangkan bahawa JV tidak pernah memberitahu Petrodar pada bila-bila masa akan pertukaran dalaman atau memaklumkan kepada plaintif tentang perkara yang sama apabila berurusan dengan plaintif, fakta bahawa plaintif hanya berhubung dengan defendan kedua dan dengan sesetengah orang dalam kalangan defendan kedua tidak menjejaskan daripada kesimpulan bahawa JV wujud sebagai perkongsian yang terdiri daripada defendan pertama dan kedua (lihat perenggan 167).

(3) Terdapat banyak keterangan untuk membuktikan bahawa defendan pertama adalah sememangnya rakan kongsi dan pihak kepada perjanjian yang dibuat dengan plaintif. Perjanjian untuk perolehan bagi peralatan yang perlu yang mana diperlukan oleh JV pasti akan digunakan ke arah menjayakan penyempurnaan projek. Elemen-elemen bagi dapatan kewujudan suatu perkongsian telah dipenuhi. Pihak-pihak mempunyai hubung kait dalam JV di mana mereka mempunyai perniagaan yang sama, iaitu projek tersebut dan bahawa perniagaan adalah untuk mendapat keuntungan. Kedudukan tersebut tidak pernah berubah sama ada kontrak dengan Petrodar atau plaintif (lihat perenggan 176–177).

(4) Transaksi yang dimeterai bukanlah sama sekali transaksi peminjaman wang memandangkan elemen-elemen yang tertulis di dalam s 2 Akta Pemberi Pinjam Wang 1951 tidak wujud. Pembentukan perkataan dan tafsiran itu juga jelas di dalam definisi 'moneylender' di dalam s 2 Akta. Definisi itu adalah muktamad dalam mentakrifkan pemberi pinjaman wang, iaitu 'means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him'. Oleh itu terdapat keperluan untuk adanya seorang pemberi pinjaman dan peminjam. Tidak terdapat aktiviti peminjaman wang sama sekali. Plaintif bukanlah dalam perniagaan peminjaman wang. Ia merupakan syarikat yang terlibat dengan aktiviti perolehan (lihat perenggan 180 & 185–186).

(5) Tidak dapat dinafikan bahawa jenis nyata dan sebenar konsortium

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Bentini-NF Energy JV adalah suatu perkongsian. Rakan-rakan kongsi bersama untuk satu perniagaan yang sama untuk mendapatkan projek Petrodar dan untuk mendapat keuntungan daripada perniagaan tersebut. Kehadiran kakitangan kanan defendan pertama sepanjang hubungan dengan defendan kedua adalah bukti kebenaran tersebut. Bahawa hubungan tetap diteruskan meskipun perubahan berlaku dalam pihak pengurusan dan butiran kewangan kerana perniagaan bersama kekal sama (lihat perenggan 199).]

Notes

For cases on dispute as to existence, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1035–1037.

Cases referred to

Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor [1992] 1 MLJ 166, HC (refd)

Brundell v Alexander (1886) 12 VLR 908 (refd)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513, FC (distd)

M Young Legal Associates Ltd v Zahid Solicitors (a firm) and others [2006] EWCA Civ 613, CA (refd)

Maraputra v Kumagai [1999] MLJU 679; [2000] 2 CLJ 311, HC (refd)

Ngui Mui Khin v Gillespie Bros & Co Ltd [1980] 2 MLJ 9, FC (refd)

Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd [2006] 1 MLJ 158, CA (refd)

Scarf v Jardine (1882) 7 App Cas 345, HL (refd)

Sinnathamby a/l Klondakoundan & Ors v Brijkishore a/l Shuparshad [1998] 1 MLJ 31; [1997] 4 CLJ 568, CA (refd)

Stekel v Ellice [1973] 1 All ER 465, Ch D (folld)

Tham Kim Fai @ Tham Kim Fay v Ng Kon Seong [2006] 7 MLJ 1; [2006] 4 CLJ 634, HC (refd)

Zalwadi Farms (M) Sdn Bhd (formerly known as Innovasi Permai Sdn Bhd) v Prudents Gateway Sdn Bhd & Ors [2011] MLJU 870; [2011] 1 LNS 1108, HC (refd)

Legislation referred to

Moneylenders Act 1951 s 2

Partnership Act 1961 ss 2, 3(1), (2), 4, 7, 16, 38(1), (2)

Lim Chee Wee (Lee Shih and Kwan Will Sen with him) (Skrine) for the plaintiff.

Vatsala Ratnasabapathy (Dennis Khong with him) (Zain & Co) for the defendants.

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Mary Lim J:

INTRODUCTION

[1] What is in a name? A lot as will be seen in this case. For the plaintiff, it is more than a name. It claims that the name 'NF Energy-Bentini JV' represents a partnership between the first and second defendants. It claims that it was the basis upon which the plaintiff had contracted with these defendants. For the first defendant, it is just a name; not a partnership.

BACKGROUND FACTS

[2] It all started far away, in Sudan, in fact with a company called Petrodar Operating Co Ltd ('Petrodar'). Petrodar is a joint venture company comprising China National Petroleum Corp, Petroliam Nasional Bhd, Sudan Petroleum Co Ltd, China Petroleum and Chemical Corp and Al-Thani Corp.

[3] The first and second defendants, formed a consortium known as 'NF Energy-Bentini JV' ('the JV') which successfully secured an engineering, procurement, construction and commissioning contract of pumping facilities ('EPCC') from Petrodar; otherwise known as 'the project' by the first defendant. A letter of award dated 1 June 2004 was issued by Petrodar to the JV for the project. This contract amounted to approximately USD180m and involved the building of six pumping facilities in the Melut Basin in Sudan.

[4] The JV did not have sufficient letter of credit facilities. By agreement made on 21 December 2004, the plaintiff agreed with the JV that the plaintiff would carry out the contract for the 'Supply and Delivery of Main Equipment, Machinery and Bulk Material to NF Energy-Bentini JV for EPCC Pumping Facilities in Sudan' ('the procurement agreement').

[5] The plaintiff and the JV next executed 45 agreements whereby the JV sold equipment to the plaintiff ('the sell agreements'); and 45 agreements whereby the JV bought the same equipment from the plaintiff ('the buy agreements'). In essence, these sell and buy agreements allowed the plaintiff to provide the JV with the necessary financing.

[6] The third defendant issued a corporate guarantee dated 22 December 2004 in favour of the plaintiff essentially agreeing to indemnify the plaintiff in the event the JV failed to observe or committed any breach of its obligations in any of the agreements.

[7] Around August 2005, the JV defaulted in their obligations to make payments to the plaintiff under the buy agreements. Upon letters of demand

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issued and letters exchanged between the plaintiff and the JV, the JV is said to have admitted to the claim. However, the debt which stands at EUR38,734,400.20 together with interest remained unsatisfied.

[8] These letters of demand spawned civil suits being filed by the first and second defendants against the plaintiff. In the first suit filed at the High Court, Kuala Lumpur (Civil Suit No S6–22–687 of 2006 ('the 687 Suit')), the plaintiff's there claimed that the agreements related to the plaintiff here were void and unenforceable for being illegal money lending transactions. In the second suit filed also at the High Court at Kuala Lumpur (Civil Suit No S1–22–790 of 2006 ('the 790 Suit')), the plaintiff's alleged that the plaintiff here was in breach of a logistics contract. The same firm of solicitors, Messrs GH Tee & Co represented the first and second defendants in those two suits.

[9] The present suit was filed in 2007. The parties subsequently successfully applied for the 687 Suit to be transferred to and consolidated with the present suit. This was in October 2008. At this point, the first defendant had yet to be served with the cause papers in the present suit. When the plaintiff attempted to serve the papers on Messrs GH Tee & Co, it was refused. Service out of jurisdiction was then affected. After the first defendant failed to set aside the service, it filed its defence under its new solicitors.

[10] The plaintiff's claims against the second and third defendants were discontinued on 12 February 2012.

[11] The basis of the plaintiff's claim here is that the first defendant is liable for the debts due under the sell and buy agreements by virtue of its partnership with the second defendant in the JV. If that partnership had been terminated or dissolved as alleged by the first defendant, the plaintiff maintained that the first defendant nevertheless knowingly suffered and continued to allow the second defendant to hold the first defendant out as part of the partnership. In support of its claim, the plaintiff relied on the various agreements signed; the dealings and meetings as well as records of those meetings and negotiations held and attended by the first defendant and/or the JV, these meetings not necessarily confined to those between the plaintiff and the JV but involving Petrodar; and the testimonies of the witnesses called.

[12] In defence, the first defendant claimed that sometime in 2003, the first and second defendants had expressed interest in cooperating with each other via a joint venture to bid for and carry out the project. A memorandum of understanding dated 27 August 2003 was concluded between them to reflect the understanding and arrangement between the two defendants ('the JV

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MOU'). The JV MOU also recorded that the parties would execute a formal joint venture agreement in due course to settle and formalise the terms and constitution of the joint venture.

[13] After its successful bid, Petrodar refused to make any advance payments or issue and letters of credit in favour of the joint venture. The first defendant who was to provide a performance bond and to secure funds for supplies and materials required for the project needed these letters of credit issued by a bank of international standing in order to secure a performance bond from its banks. Due to these changes, the first defendant decided to withdraw from the project but was persuaded by the second defendant to remain 'supportive of the project'.

[14] The second defendant further assured the first defendant of its confidence in securing the necessary financing and of its commitment towards a successful completion of the project. To this end, the first defendant agreed to support the project as a hired consultant, contributing ad hoc services and/or manpower and to receive remuneration in the form of a fixed retainer fee. The defendants no longer shared profits or management of the joint venture. This latest arrangement were reflected in three agreements drawn up between the defendants, namely the JV agreement; the supplemental agreement; and the project management consultancy agreement; collectively known as the 'collaboration agreement'.

[15] Following the collaboration agreement, the first defendant claimed that it had withdrawn from the project completely. Specifically, cl 2 provided that the second defendant acknowledged the first defendant's desire to limit and/or eliminate its exposure, risk and/or loss and/or liability that may arise out of the performance of the contract and/or JV agreement. The second defendant also agreed to limit and/or eliminate the first defendant's said exposure, risk and/or loss and/or liability.

[16] Further, the second defendant was to undertake the full performance of the project at its own costs, risk and liability. Under the supplemental agreement, once the agreement had been executed, the second defendant had no rights, title and interest in all assets, property and equipment acquired or contributed by the second defendant in connection with the performance of the project and/or JV agreement. This included any cash or monies derived or received under the project.

[17] Lastly, the first defendant alleged that when Petrodar and the second defendant signed a contract on 26 July 2004, it did not attend the signing of this contract. It also did not attend any meeting on 21 December 2004, enter

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into any agreement with the plaintiff; nor was it aware of its involvement in the manner alleged until sometime 2006 when the plaintiff's solicitors' letter of demand was received.

[18] In substance, the first defendant denied being in partnership with the second defendant; denied being party to the procurement agreement as well as the 45 sell and buy agreements; and contended that it was entirely the second defendant who should be liable. It claimed that it did not agree to the terms of the sell and buy agreements. In addition, the first defendant denied having any knowledge of the various cases filed in court involving the plaintiff and these defendants; and it claimed that it had never retained or appointed solicitors to represent the first defendant in any of the proceedings.

[19] The defendant claimed that the plaintiff was dealing with, and that the plaintiff knew at the material time that it was dealing with the second and third defendants who were trading in the name and style of the first defendant. The JV was unincorporated and could not be liable as alleged.

[20] The first defendant alternatively pleaded that these transactions are void as they are in fact and substance money lending transactions in contravention of the Moneylenders Act 1951. As for the admission made by the third defendant, the first defendant claimed this was without its knowledge, participation, consent, and/or approval. As such it did not bind the first defendant.

[21] In reply, the plaintiff, inter alia, claimed that the second defendant was the first defendant's agent in respect of the EPCC or procurement agreement and the 45 sell and buy agreements and all matters related thereto. If not, then the second defendant had apparent authority and the first defendant was estopped from denying such authority; and that the plaintiff was induced to enter into agreements on the strength of such representations. In this regard, the plaintiff relied on cll 4 and 5 of the supplemental agreement. These provisions in essence concern the first defendant's position and knowledge of the matters now complained of by the plaintiff.

[22] At para 9 of the reply, the plaintiff detailed the two related civil actions of 'Suit 687' and 'Suit 790' which was alluded to earlier. The plaintiff contended that if the first defendant had indeed never provided authority to solicitors to file these suits on its behalf, the first defendant did not take any steps to prevent the solicitors at the material time from continuing to act on its behalf. Instead, the two suits continued to be pursued. Both these suits and in fact, several other suits referred to by both parties will be examined later for their effect and relevance.

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ISSUES FOR DETERMINATION

[23] From the above, the parties initially identified the following five issues for determination:

(a) was the first defendant ever a party to the procurement agreement and the 45 sell and buy agreements?

(b) was the first defendant in a partnership with the second defendant at the material time, that is, from December 2004 until January 2005?

(c) what is the effect of the power of attorney executed by the first defendant in favour of the second defendant?

(d) in the alternative, did the procurement agreement and the 45 sell and buy agreements constitute illegal money lending transactions? and

(e) has the plaintiff established and proved its loss?.

[24] The third issue concerning the power of attorney need not be considered as it was abandoned by reason of it not being part of the pleaded case. This was recorded on 20 June 2012. The court will therefore disregard all written submissions on this. This was confirmed at the oral submissions.

[25] A full trial was conducted. The plaintiff called four witnesses, namely Megat Nor Hashim bin Megat N Ibrahim ('PW1') who was the plaintiff's former chief executive officer; Freida bt Amat ('PW2') who was the plaintiffs former general manager, Finance and Accounts Services Division; Jeffrey Ng Keng Keong ('PW3'), the former vice president and executive director of the third defendant; and Tee Geak Hock ('PW4'), the solicitor who was involved in 'Suit 687' and 'Suit 790'. As for the first defendant, Carlo Bentini ('DW1'), its chief executive officer, sole director and majority shareholder of the first defendant testified. He testified in Italian through the services of an interpreter.

[26] A total of 69 bundles of documents were filed. Bundles 21–51 relate to the sell and buy agreements. I shall deal with these documents and the testimonies of the witnesses when addressing the issues posed.

FINDINGS OF THE COURT

[27] Both parties have prepared well researched and comprehensive written submissions (including further and reply submissions) and have further made coherent oral submissions. The court observed that the lead counsel in both teams have generously shared certain portions of the oral submissions with their respective juniors. These juniors in turn, have competently articulated

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their causes. This overture of lead counsel is to be commended as this is not often done; or if and when done, be of such assistance to the court. The court records its appreciation.

[28] Both lead counsel also made opening statements. Again, this is not frequently done. Here, it proved useful as it summarised both parties' respective stands as already set out above.

[29] Before dealing with the issues, I propose to set out a chronology of the material events. This for easier appreciation and to facilitate a better understanding of the facts:

27 August 2003	:	JV MOU entered into between the first and second defendants relating to the EPCC. These parties agreed to bid for the EPCC through an unincorporated JV of Bentini-NF Energy JV, with the second defendant as the lead party to the JV.
21 April 2004	:	Addendum to JV MOU entered into between the first and second defendants. Parties agreed to bid for EPCC through unincorporated JV of Bentini-NFE, that is, Bentini-NF Energy JV with the first defendant as the lead party to the JV.
12 May 2004	:	Pre-letter of award meeting between representatives of Petrodar and Bentini-NF Energy JV/ITB meeting.
31 May 2004	:	Representative of Petrodar, OGP and Bentini-NF Energy JV had a teleconference confirming revision of tender price by Bentini-NF Energy JV for the EPCC tender.
1 June 2004	:	Gaetano Cavicchi on behalf of the first defendant and Bentini-NF Energy JV signed off on the minutes of ITB (invitation to bid) meeting.
1 June 2004	:	Petrodar wrote to Bentini-NF Energy JV informing that the terms of the Bentini-NF Energy JV's bid had been revised to USD180m and that the terms were subject to approval by the Sudan Government and Petrodar's management.
1 June 2004	:	Petrodar granted Bentini-NF Energy JV the letter of award.

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10 June 2004	:	letter by the second defendant (PW3) to the first defendant (Carlo Bentini, DW1) on the possibility of the first defendant's withdrawal from the Bentini-NF Energy JV.
18 June 2004	:	JV agreement, supplemental agreement and PMC agreement (collaboration agreement) entered between first and second defendants.
25 July 2004	:	Petrodar and Bentini-NF Energy JV executed EPCC contract.
9 August 2004	:	Petrodar wrote to Bentini-NF Energy JV addressed to, inter alia, Gaetano Cavicchi relating to issues of customs clearance and tax exemption in respect of the Petrodar project.
2 December 2004	:	Meeting between representatives of the plaintiff and Bentini-NF Energy JV regarding procurement and logistics arrangement.
7 December 2004	:	Bentini-NF Energy JV wrote to Petrodar seeking its approval regarding procurement arrangement between the plaintiff and Bentini-NF Energy JV.
10 December 2004	:	Petrodar wrote to inter alia Gaetano Cavicchi relating to the sell and buy agreements.
21 December 2004	:	Letter of offer for supply and delivery of main equipment, machinery and bulk material to Bentini-NF Energy JV for EPCC accepted by Bentini-NF Energy JV.
20 December 2004	:	First sets of buy and sell agreements between the plaintiff and Bentini-NF Energy JV.
22 December 2004	:	Bentini-NF Energy JV accepted the plaintiff's letter of offer.
23 December 2004	:	The first defendant granted power of attorney to the second defendant.
11 May 2005	:	Correspondence between Petrodar and Bentini-NF Energy JV copied to the first defendant (Gaetano Cavicchi).
23 May 2005	:	Petrodar wrote to Bentini-NF Energy JV, addressed to, inter alia, Gaetano Cavicchi relating to delay in payments by Bentini-NF Energy JV to the plaintiff in respect of the plaintiff's procurement services via the 45 sell and buy agreements.

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25 June 2005	:	Petrodar wrote to Bentini-NF Energy JV addressed to, inter alia, Gaetano Cavicchi relating to technical matters in the project.
29 June 2005	:	the second defendant's letter sent on behalf of Bentini-NF Energy JV to Petrodar correcting minutes of meetings held on 30–31 May 2005 and 3 June 2005.

[30] Returning to the issues, it cannot be disputed that what is paramount for determination is the question of whether the first and second defendants were in any relationship. If so, what is the real or true nature of that relationship? Only upon answering that question can one proceed to ask whether the first defendant was a party to the agreements identified. The second question will therefore be answered first before dealing with the first question.

Was the first defendant in a partnership with the second defendant at the material time, that is, from December 2004 until January 2005?

[31] In effect, the question is: what is the real nature of the JV? The plaintiff has answered this issue by claiming that the first defendant was in partnership with the second defendant at all material time. It was upon this partnership that the first defendant and the second defendant made a bid for the project, negotiated and was awarded that project; entered into negotiations with the plaintiff which culminated in the signing of the procurement agreement and the 45 sell and buy agreements. The plaintiff relied on the JV and the addendum and several other documents as well as the conduct of the first defendant in making this assertion.

[32] It was the submission of learned counsel for the first defendant that the substratum of the intentions and relationship between the parties are to be found in the collaboration agreement and not the earlier JV MOU and the addendum. Whatever may have been agreed in these earlier documents, the first defendant maintained that it had all changed and it is to these latter documents that the question of the nature of the relation between the first and second defendants is to be answered.

[33] The legal principles governing the relation between persons or legal entities and known as a 'partnership' are to be found in the Partnership Act of 1961 ('Act 135'). Act 135 contains comprehensive provisions on, inter alia, the existence and dissolution of partnerships; it describes the nature of the relation; and it provides for the powers, duties, rights, liabilities and accountability of the partners to each other and to the third parties dealing with the partners and the partnership.

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[34] According to sub-s 3(1) of Act 135: A

> Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

[35] Certain relations are excluded from this definition (see sub-s 3(2)) while certain circumstances are not prima facie partnerships (s 4). None of this is relevant in the facts of our instant case. B

[36] It is interesting to note that the definition of 'partnership' in sub-s 3(1) uses the term 'subsists'. This infers that the relation must actually exist as opposed to a mere description of the relation. As opined by Abdul Malik Ishak (as His Lordship then was) in *Tham Kim Fai @ Tham Kim Fay v Ng Kon Seong* [2006] 7 MLJ 1 at p 5 (MLJ); [2006] 4 CLJ 634 at p 638 (CLJ): C

> ... unlike a company, a partnership is simply a relationship governing the rights and duties of the partners and their relationships with the rest of society. The main difference between a partnership and a company is this. A partnership does not confer any limited liability on the partners. Thus, a partner is liable without limit for the debts incurred by the other partners in the course of the partnership business. D

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[37] His Lordship also identified what he called 'three essential elements' that must be present in the relation of persons before it is recognised as a 'partnership', namely:

(a) there must be a business; F

(b) carried out in common between the partners; and

(c) with a view to making profit.

[38] To start with, any number of persons may come together in that relationship so long as those three elements are fulfilled. Those persons may comprise any combination of legal entities, including corporate soles such as the case here. G

[39] Subsection 3(1) further focuses on the activity that the relation is involved in. When those persons get together, they must do so in order to carry on a business. The term 'business' is defined in s 2 of Act 135. It is a wide and non-exhaustive definition: H

> 'business' includes every trade, occupation or profession.

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[40] Every type of trade, occupation or profession is capable of being a business that these persons may carry on so long as that business is carried on in common by them. The phrase 'in common' has been explained by the Federal Court in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd &*

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Anor [1995] 1 MLJ 513, at p 521 as referring to 'a single business by the parties'.

[41] In this case, the Federal Court examined the facts and found that relationship did not result in a partnership. The plaintiff (through his father) had provided land while the first defendant was to provide capital, labour and services to develop and build on the land. Under the joint venture agreement made between the parties, each was to take, to the exclusion of the other, certain sub lots with or without buildings erected thereon and which the parties could deal with as they pleased. The Federal Court found that from these circumstances, each party actually intended a separate business and there was no 'business in common' nor did it follow that it was one 'with a view of profit'.

[42] Lastly, that single business that the parties carry on must be with a view of profit. Although the objective or view of profits may not be realised ultimately, it does not derogate from finding that a partnership subsists so long as the objective to make a profit existed at the time of the formation of that relationship. In *Tham Kim Fai*'s case, Abdul Malik Ishak (as His Lordship then was) opined at p 639 that:

> It is however reasonable to assume that not all partnerships would thrive and beget profit. It is quite common to see, as a rule, that a partner may contribute either property, skill or labour. So if a person contributes a property without rendering any labour, that person is called a sleeping or dormant partner. However, there are cases where sleeping partners contribute nothing at all (*Pooley v Driver* [1876] 5 CH D 458 at pp 472–473) and this is a common denominator in every part of the world. It is always a question of mixed law and fact when one is asked to determine whether there is in existence a partnership between parties.

[43] While the element of 'profit' is an important requirement, it is not necessarily proved by the show of accounts or even the level of equity participation of each of the parties. In *Maraputra v Kumagai* [1999] MLJU 679 at p 45 (MLJU); [2000] 2 CLJ 311 at p 339 (CLJ), the defendant had argued that it had teamed up with the plaintiff not to make profits but 'to procure a foothold in the road construction industry in Malaysia' which reason or object was conveyed to the other parties prior to the execution of the joint venture agreement. After perusing the joint venture agreement in detail and after considering all the evidence presented concluded, the court rejected the argument and made these remarks:

> It cannot be denied that both parties entered into the joint venture agreement in furtherance to, and for a business transaction, although it was strenuously argued by the defendants that they were interested to secure a foothold in the construction industry in Malaysia and did not care if any profit would accrue as a result of this policy. In the absence of cogent and reasonable explanation, the court is entitled to conclude that the parties at the very least entered into the joint venture, with a view to try and make a profit.

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[44] Quite aside from these elements is the consideration of the intention of the parties at the material time. This was reminded by the Federal Court in *Chooi Siew Cheong* and repeated by the Court of Appeal in *Sinnathamby a/l Klondakoundan & Ors v Brijkishore a/l Shuparshad* [1998] 1 MLJ 31; [1997] 4 CLJ 568. In *Chooi Siew Cheong*, the Federal Court that the 'intentions of the parties as appearing from the whole facts of the case and the contract they had made'.

[45] This position in law is equally applicable to joint ventures which are quite common arrangements in any trade, occupation or profession. There is however a distinction between joint ventures and partnerships. This was acknowledged by the Court of Appeal in *Sinnathamby a/l Klondakoundan*. Denis Ong JCA, writing the unanimous view of the Court of Appeal said:

> It is more or less accepted that there is a distinction between a joint venture and a partnership; that a joint venture may or may not be a partnership and that in deciding whether or not a partnership existed, the court must have regard to the relevant rules in s 4 of Act 135 and the intention of the parties as appearing from the whole facts of the case and the contract the joint ventures had made.

[46] The Court of Appeal went on to cite with approval the opinion of the writers, Higgins and Fletcher — *The Law of Partnership in Australia and New Zealand* (7th Ed), (1996) at p 90, which I find useful to set out:

> Whether, in the absence of an express agreement, a partnership contract can be inferred from the conduct of the parties is purely a question of fact depending upon the joint and not the individual intention of the parties. The intention is not to be determined by an examination of the private intention of each party but is to be ascertained by inference from their conduct and actions, throughout the whole course of their dealings with each other. As the ascertainment of a joint intention is a question of fact, a determination by a trial judge or jury will not normally be subject to review by an appellate court.

[47] In fact, similar cautions were adopted and applied earlier in *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166. Peh Swee Chin J was of the view that in order to find whether a partnership existed, it would be necessary to determine if the relation as defined in s 3(1) existed. For that, His Lordship said:

> In my view, to find the existence of such relation, the court must find the real intention of the parties in dispute or involved. The real intention is not necessarily the expressed intention of the parties so that even if the parties express they are partners, the court may decide to the contrary after the court considers all relevant factors taken together ...
>
> The definition section really sets out the essence of the decided cases, ie the court is perfectly at liberty to determine from all the relevant factors taken together, if such

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A relation exists or does not exist, then the court attributes this finding as the real intention of the parties. This has nothing to do with curbing contractual freedom but is meant to do justice.

B **[48]** His Lordship further opined that:

C ... conduct of the parties herein and surrounding circumstances, all occurring not necessarily before but also after the signing of P4, ie the so-called joint venture agreement between the corporation and the developer, could be considered and taken together with P4 for the court's function was not solely and only confined to the interpretation of P4 but to the very larger question of whether the relation as defined by s 3(1) aforesaid existed.

D **[49]** In her written submissions, learned counsel for the first defendant argued that it was incumbent on the plaintiff to adduce expert evidence on the law of partnerships in view of the choice of law or governing law clause in the JVA, supplemental agreement and the PMC. Clauses 16, 20 and 12 respectively provide for the relationship of the parties to be governed by English law.

E **[50]** With respect, I disagree. One can take heed from the authorities cited which include decisions applying English law on contract and on partnership. These decisions show that the English legal principles are substantially the same as Malaysian law on contract and on partnership; and no expertise is really required. In any event, no party has pointed out or suggested any material

F difference.

[51] Be that as it may, it is apparent that the determination of the real nature of the relation between the first and second defendants is a mixed question of

G law and fact. After scrutinising the evidence before me, especially the contemporaneous documentary evidence, I am satisfied that the elements stipulated in sub-s 3(1) are fulfilled. I am satisfied that the true nature of the JV is that of a partnership.

H **[52]** The parties to the unincorporated JV of Bentini-NF Energy JV had every intention that the JV subsists as a partnership; that the first defendant together with the second defendant did in fact proceed to carry on as one; and the first defendant held out to the third parties including the plaintiff, that it was in partnership with the second defendant under the JV.

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The oral testimonies

[53] DW1's evidence itself is telling in this respect. His evidence alone tells how the first defendant understood the arrangements under the JV.

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[54] In his examination-in-chief, DW1 referred to the relationship of the first and second defendants in the JV as 'partners in the JV' with the first defendant being referred to as 'Lead Partner' instead of 'Lead Party'. DW1 who was kept appraised and consulted in relation to the development of the JV's bid on the project explained the parties' intentions to the court in the following terms:

> In brief, both NFE and Bentini planned to create a joint venture where both companies would have equity in it. This means that both Bentini and NFE would be partners in the JV and both companies would have a share in the profit as well as share in the managing and making decisions for the JV. Both companies also agreed that Bentini would be the leading party in the JV. Bentini also envisaged that we would pool our financial resources and expertise for the Petrodar Project. For example, Bentini and NFE would jointly solicit, guarantee and procure a common Performance Bond for the Petrodar Project. Both companies were also to divide the responsibilities such as the scope of design and engineering to be performed by each company in the Petrodar Project.

[55] This explanation confirms the plaintiff's contention that the two parties in the JV were in fact and in law, partners within the meaning found in sub-s 3(1) of Act 135.

[56] As for the plaintiff's witnesses, they had dealt with the second defendant by the time of the procurement agreement and the 45 sell and buy agreements. By this time, the collaboration agreement had already been signed and the second defendant had become the lead party. I shall deal with this further when dealing with the question of whether the first defendant is a party to the agreements signed with the plaintiff.

The documentary evidence

[57] Dealing then with the documentary evidence. This refers to the JV MOU, addendum to the JV MOU, letter of award, collaboration agreement, Procurement agreement and the 45 sell and buy agreements. As will be seen, all these documents reverberate with the same resounding tune that the first defendant was in this relation as a partner, and that capacity remained unchanged at all time.

The JV MOU and its addendum

[58] We start with the JV MOU and the addendum to the JV MOU which were undeniably signed between the first and second defendants. In the case of the first defendant, it was signed by its project manager, Mr Venturi Gianni, and witnessed by its Director, Industrial Plant Division, Mr Cavacchi Gaetano. The identity and authority of Mr Cavacchi Gaetano is not disputed by the first defendant.

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[59] These are the terms of the JV MOU:

MEMORANDUM OF UNDERSTANDING

This memorandum serves to record the understanding between the parties hereto relating to the EPCC of Pump Stations (hereinafter referred to as Contract) for Petrodar Operating Company (hereinafter referred to as PETRODAR or Client) at ...

PARTIES HERETO:

1. NF Energy Sendirian Berhad (hereinafter referred to as NFE) a company incorporated in Malaysia ...
2. Bentini S.p.A. (hereinafter referred to as BENTINI) a company incorporated in Italy.

WHEREAS:

1. PETRODAR is going to invite bidders for the abovementioned Contract.
2. NFE and BENTINI wish to bid for the Contract through an unincorporated joint venture (JV) with NFE as the Lead Party to the JV.
3. NFE and BENTINI shall cooperate with each other in all matters prior to and after formalization of the Contract Award including in particular but not limited to the preparation and submission of the proposal and clarifications thereto and in meetings and negotiations prior to the award of the Contract and in the execution of the Contract.
4. All costs and expenses and other incidentals incurred by each party in fulfilling the requirements of the article 3 above shall be borne by each party itself.
5. The parties shall enter into an agreement prior to the submission of the bid proposal for the Contract, to form an unincorporated joint venture. The JV agreement shall address, inter alia, the split in the Contract scope of work, management of the Contract; responsibility and liability of each party on the Contract and finance matters.
6. This Memorandum is effective from 27th August 2003 and shall terminate upon the happening of any of the events below:
   a) Both Parties fail to sign a JV agreement ...
   b) NFE and BENTINI JV fail to submit a JV bid proposal for the Contract within the stipulated ITB submission date.
   c) If at 31 August 2004, the Parties have not yet submitted any offer to the Client for the Contract.
   d) PETRODAR does not award the Contract to the NFE and BENTINI JV.

[60] Contrary to the first defendant's arguments that the terms of contract had yet to be finalised and that this MOU did not amount to much, with

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respect, I disagree. The matters dealt with in the JV MOU are sufficient and certain enough to indicate the intention of the parties. The terms indicate that the parties had the same common intention to carry on a single common business of the project; to bid for it and to execute it, if successful, all as a single unincorporated entity.

[61] In my view, such an activity, regardless of whether it was successful, falls within the meaning of 'business' as defined in s 2. It may be added that the parties must have intended to profit from this business as there is no evidence to suggest that anyone of them was bidding for the project in order to 'secure a foothold' in the building of pumping facilities for the oil and gas industry in Sudan. Therefore, I agree with the plaintiff that the first defendant intended and did effect the intention of forming a partnership with the second defendant in this JV.

[62] In any case, it would appear that the addendum to the JV MOU attended to those details further as it was quite comprehensive, detailing the sharing of the scope of work, responsibilities, costs, equity participation, and many other matters. I shall highlight some of the new or amended terms in the addendum which was signed this time by Mr Gaetano Cavicchi on behalf of the first defendant, and witnessed by one Massimilano Nobili, its proposal manager:

> (2) NFE and BENTINI wish to bid for the Contract through an unincorporated joint venture (JV) with Bentini SPA as the Lead Party to the JV.
>
> (3) BENTINI shall be the Lead Party of the unincorporated JV with general project scope responsibility for the engineering design, procurement, civil works in P.S. N° 4, 5, 6, electrical works, instrumentation works and SCADA system ...
>
> (4) NFE shall have general project scope responsibility for procurement, civil works in P.S. N° 1, 2, 3, structural works, piping works, hot oil heat tracing, thermal insulation and equipment insulation ... (Attachment 1).
>
> (5) The share of costs/prices is detailed in the Attachment 2.
>
> (6) It is created a 'Common Pot' item that includes the equipment listed in the table in attachment 3 where the procurement actions will be done by NFE for the power generator and Owner cars and other deliverable equipment, and by BENTINI for the other mechanical equipment.
>
> The participation of the Parties on the common pot items is in equity as specified by the final price table ...
>
> (7) The Management of the project will be done by a project management team shared between the Parties ...

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(9) The participation of the Parties to the project is the following:

BENTINI	64.5%
NFE	35.5%

[63] Again, the addendum provided that it will 'terminate upon the happening of the events cited in the original MOU'.

[64] Attachment 1 to this addendum sets out how responsibility of activities between the first and second defendants is shared. The activities being 'tagged valves & items', 'electrical & CP systems', 'instrument', 'fire fighting equipment'. It cannot be denied that these activities relate to the project and the sharing of responsibilities indicates a common object, that is, to bid, and if awarded, to execute and implement that project together.

[65] This sharing of responsibility between the parties does not detract from nor does it change the real nature of the relation between these two defendants. As discussed earlier, that relation was to carry on as a partnership for and on the same single piece of work, that is, the project. The project is the common business of the parties.

[66] This is quite different from what happened in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* where the Federal Court found from the facts and circumstances that there was not 'a single business by the parties' and that each party actually intended a separate business with there being no 'business in common'.

[67] The practice of sharing; be it of the work, responsibilities or any other aspect in a relation, is frequently deployed for practical and sound business reasons. Often, persons team up to present the best and widest range of skills and expertise so as to attract and succeed in a common goal. Such arrangements and relation is often seen in legal expertise. Lawyers with different expertise pool together with their area of specialisation in the relation of partnership. The goal or object generally, and the present facts are no exception, includes a view of profit and not benevolence on the part of any one of the parties.

[68] As reflected in both the JV MOU and the addendum to it, the parties had agreed that there was a need for a lead party in this joint venture. Otherwise, parties dealing with them would be confused. The object of such an appointment surely must include the understanding that the lead party speaks for and on behalf of the persons in the joint venture.

[69] This must also mean that the lead party's words and deeds bind all those within the JV. Otherwise, the other contracting party such as Petrodar and the

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plaintiff will simply have to deal with each and every party in the JV which surely cannot have been the objective of the JV in the first place.

[70] This unity of representation is significant and is illustrative of the common intention of the parties, that they are single-minded in their intent; that one can speak for the other and for all the parties in the joint venture. This unity of voice shows that the first and second defendants are not separate entities for the purpose of this venture or project.

[71] To add, the ease and readiness of the parties in changing the identity of the lead party shows how comfortable the parties were with one another. It is reasonable to say that this was possible because of the common intention of the parties in forming the partnership; and which is what this JV truly is, a partnership.

The letter of award

[72] The letter of award from Petrodar fortifies this conclusion. It is sent to 'The Consortium of: Bentini SPA/NF Energy Sdn Bhd' at what appears to be the address of the first defendant in Italy and marked for the attention of Mr Gaetano Cavicchi. The consortium or JV is treated as a single entity without any distinction between the two partners.

[73] When the JV submitted its proposal for Petrodar's consideration in April 2004, a copy of the JV MOU was included as part of its documentation. It formed part of the bid together with the technical proposal and the commercial proposal. That tender proposal dated 29 April 2003 together with all your clarification responses and techno-commercial telephone conversation dated 31 May 2004 (minutes attached) is one of the documents to which the letter of award was subject to and which must be read together with the letter of award.

[74] This shows the importance of the JV MOU contrary to the present submissions of the first defendant. Not only was it a document that successfully brought the first defendant the award of the project, it formed part of the contractual documents in relation to that contract.

[75] The letter of award required the JV to signify its acceptance and agreement to the stipulated terms and conditions by signing the acknowledgment receipt. The JV did so accordingly on 10 June 2004. It was signed by none other than the President of 'Bentini S.p.A.-NF Energy Sdn Bhd Consortium', Mr Carlo Bentini; DW1. At this point in time, one can readily deduce that the JV was very much intact in the form and understanding it was first formed.

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The collaboration agreement

[76] Dealing next with the first defendant's contention that the three agreements which are now referred to as 'the collaboration agreement' and all dated 18 July 2004 formed the substratum of the intentions and relationship between the parties and not the earlier JV MOU and the addendum. It was the first defendant's further contention that the collaboration agreement terminated or dissolved any partnership.

[77] DW1 testified that the first defendant withdrew from the JV because of Petrodar's refusal to make advance payments. No other reason has been proffered for its claim of change of intent. There was no allegation about anything being wrong with the other partner for example. It was only this concern about the advance payments. This concern therefore requires closer examination.

[78] DW1 claimed that the JV had clearly stated in the bid that it required LCs and advance payment for the Petrodar project. He told the court that the advance payment and the LCs served important purposes.

[79] First and foremost, the advance payment was needed to cover the initial expenditure incurred at the outset of any project. This expenditure included funds, for example, for securing and raising performance bonds required under the project, acquiring supplies and materials, mobilising manpower and equipment.

[80] According to him, 'the LCs were to secure the payments from Petrodar, in light of the financial and economic embargoes on Sudan'. He claimed to be 'astonished by Petrodar's position' and that as far as the first defendant was concerned, it was 'a very negative development, especially in combination with their earlier refusal to make advance payment in the project. As it was, Petrodar's stance on the advance payment and LC was unusual in the industry for a project of this size and it was unacceptable for Bentini'.

[81] He further told the court that without the LCs and the advance payment, 'the financial risk in the Petrodar Project had become unacceptably high for Bentini. Because of this, we were no longer prepared to participate in and carry out the project. In any event, without the LCs it would also not have been possible for Bentini to raise the financing needed for the initial expenditure from our banks ...' He claimed to have informed the second defendant 'of our desire to therefore pull out of the Petrodar Project completely'.

[82] Accepting for a moment that the first defendant had this concern, the

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question is whether it had communicated the same to Petrodar in particular. In this regard, the communications with Petrodar are insightful.

[83] Following the JV's bid, Petrodar called for a technical clarification meeting of the JV's proposal (also known as ITB or Invitation to bid meeting) on 12 May 2004. The minutes of technical proposal clarification meeting also form part of the binding terms of contract between the JV and Petrodar as advised in the letter of award. The accuracy and reliability of these minutes are not in issue. In any case, they were reviewed and agreed to by Mr G Cavicchi who had represented the first defendant together with Mr M Nobili. Both of them had signed and witnessed the JV MOU and addendum on behalf of the first defendant. Mr G Cavicchi signed the minutes for 'Bentini/NF Energy JV' without any reservations, corrections or amendments.

[84] Insofar as the matter of advance payment is concerned, this is what Item 3.0 of the 'Minutes of Technical Proposal Clarification Meeting' has recorded:

> BIDDER clarifies the payment progress method as per proposed percentage given in Commercial submission. OWNER stated that the payment claim shall follow physical work progress, as per ITB formal Schedule A and NO advance payment will be given.

[85] It appears to have been an extensive and detailed meeting as it took four and half hours lasting from 10am to 2.30pm. Other than this, there is no other evidence of this matter. It would appear that the first defendant accepted Petrodar's decision on this because it signed the letter of award bearing these minutes.

[86] According to the minutes, the meeting was also to clarify Petrodar's concerns, one of which was on the JV agreement and scope between Bentini and NFE. The JV, as bidder was asked to 'clearly specify the location of Engineering and Project Management head office for the execution of the project'. The JV was also asked to 'elaborate the management and interfacing of other activities (such as basic design, procurement and expediting service which will be executed in different location'.

[87] The responses of the JV, articulated by the first defendant's representatives, are as follow:

> With reference to our proposed work organisation included at Chapter 8 of our technical submission, we confirm that Project Management will be composed by an integrated team BENTINI-NFE. BENTINI, as leader of the JV, will manage and coordinate the interfaces with PDCC's Project Management in order to provide one only referent for the whole Project. This management will be held at Bentini head office at Faenza, Italy, during our first phase of the project until Khartoum Coordination Centre will be settled. Afterwards, all management activities will be

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carried out through this office at PS4. The management of engineering activities will be done by APS from its office in Rome, and it will be even encharged of Suppliers technical evaluation.

Management of Procurement activities will be done through Bentini's office that will manage the ancillary procurement activities realised both at Kuala Lumpur and Khartoum procurement centre.

[88] The clarification must have satisfied Petrodar as the conclusion on this was:

MEETING CONCLUSION

BIDDER CONFIRMS THAT BENTINI WILL BE HANDLING ON ELECTRICAL AND INSTRUMENTATION ITEMS AND NF ENERGY WILL BE HANDLING ON MECHANICAL ITEMS.

BIDDER CONCLUDED THAT THE INTERFACE SHALL BE TO ONE PARTY ONLY, WHICH IS BENTINI AS A JV LEADER, AND THIS JV IS SEVERALLY LIABLE TO ANY CIRCUMSTANCES.

OWNER NOTED.

[89] It would be fair and reasonable to infer that Petrodar must have been satisfied with the clarifications given by the first defendant (as lead party) for the letter of award soon followed. Those answers together with the JV MOU must have given Petrodar confidence to award the project worth USD180m to the JV.

[90] As remarked earlier, the letter of award was issued to the JV at an address which appears to belong to the first defendant in Italy. It would be reasonable to say that this must have followed the first defendant's explanation on 'the location of Engineering and Project Management head office for the execution of the project'.

[91] Inasmuch as Petrodar must have been satisfied with the JV's clarifications, it would be reasonable to say that the first defendant itself must have been satisfied with the position of the advance payments as was observed earlier; DW1 signed the letter of award.

[92] There was an intervening period between learning about this lack of advance payments and the issue of the letter of award, certainly sufficient time for the first defendant to communicate this change that it claimed it had to Petrodar or insisting on such payments. Yet, it did not. Instead, it signed the letter of award without reservations or amendments.

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[93] Given such circumstances, the court can only conclude that the first defendant like its other partner must have accepted Petrodar's position and went on to execute the project under those terms and notwithstanding there being no advance payments. This position was maintained and carried through even till when the actual EPCC contract was signed with Petrodar on 25 July 2004.

[94] I must add that although there is evidence that the first and second defendants did discuss amongst themselves this matter of the first defendant withdrawing from the JV — see letter dated 10 June 2004 from the second defendant, the evidence however reveal that the first defendant did not in fact carry it through. More importantly and of substantial significance, is that this was not made known to anyone, especially the plaintiff.

[95] According to DW1, in a telephone conversation between himself and PW3 for the second defendant, the first defendant was persuaded not to abandon the project completely but to remain as consultant or advisor. With this, it was said that the second defendant could benefit from the first defendant's expertise and experience while at the same time, protect the reputation of both companies. This arrangement was agreed as it supposedly would give the first defendant 'a graceful exit'.

[96] This is the second defendant's letter:

> ... we agree to take up 100% interest in the project submitted by the joint venture of Bentini SpA & NF Energy Sdn Bhd.
>
> ... we hereby confirm our undertaking to you to discharge you of any liability in this project and to indemnify you against any claims that may arise in connection with this project.
>
> The above undertaking and assurance reflect our confidence to raise the necessary financing and our commitment to carry the job to its successful completion. The withdrawal from the project at this very moment will definitely ruin the reputation of both companies. It will also get both of us blacklisted by the Sudanese authorities and possibly all the oil and gas project owners of Sudan. This will spell the end of all future business opportunities to both Bentini and NF Energy in Sudan.
>
> We sincerely hope that you will consider the serious negative consequences of withdrawal and accept our proposal which not only limit your exposure and liability, but also provide a graceful exit for Bentini as well as protecting your good name in the industry.
>
> We believe we have done all we could to save this project as well as the names of both companies ...

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[97] The evidence reveal that the first defendant must have given quite serious thought to the second defendant's caution of the serious negative consequences and implications of a withdrawal after having signed the letter of award.

[98] I would further add, quoting DW1 himself, after being so 'very actively involved in the negotiations with Petrodar', at the forefront, as 'Lead Partner' of the JV and the 'interface and point of reference with Petrodar'. This is confirmed by PW3 who informed the court that he persuaded the first defendant not to abandon the project altogether.

[99] In any event, a careful examination of the three agreements reveals that the first defendant remained as partner regardless of any change of its role in the JV.

[100] With respect, I therefore disagree and I must reject the first defendant's arguments that the collaboration agreement housed the substratum of its relationship with the second defendant with its purported change of capacity from partner to consultant.

[101] From my scrutiny, I find that all three agreements in the collaboration agreement merely amounted to a redistribution of duties, authorisation, responsibilities and liabilities between the parties. The object and common business of the JV nevertheless remained the same, and that was to carry out the contract (letter of award) and the completion of the project. This agreement did not denature the relation from that of partnership to consultancy.

[102] Dealing first with the project management consultancy agreement ('the PMC'). The PMC must be read together with the JVA and the supplemental agreement which were signed on the same date, if not the same time, as well as the JV MOU, addendum and the letter of award. The existence and relevance of those documents cannot be overstated.

[103] Under the PMC agreement, the second defendant, as 'Managing Partner of the JV' appointed the first defendant 'as its consultant for project management services for the purpose of carrying out the contract and the completion of the project'. This too reflects and confirms the earlier finding that the first defendant is indeed carrying on a common business of carrying out the contract and the completion of the project with the second defendant.

[104] On the matter of payment of consultancy fees to the first defendant instead of the agreed sharing of profits consistent with their equity in the JV, I am of the opinion that that is irrelevant. The first defendant retained its view of profit from the common business just as much as the second defendant did.

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How the first defendant was expected to realise that profit need not necessarily be the same as the second defendant's so long as it had that intention. The fact that it was concerned about the lack of advance payments from Petrodar indicates that the first defendant was actually concerned about its investment and returns from the project.

[105] In any case, the payment of fees is still pegged to the 'successful undertaking and the implementation of the project'. In other words, it was still expecting to profit from the project but it would be realised in the form of fees under the PMC.

[106] I am fortified in my view from the decision of *Stekel v Ellice* [1973] 1 All ER 465. There, the issue was whether a partner who was paid a fixed sum instead of taking a share of the profit was a partner. The court answered the question in the affirmative. Megarry J opined:

> The term 'salaried partner' is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as partner on the notepaper of the firm, and so on. At the same time, he receives a salary as remuneration rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent on the profits. Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner will be liable for his acts accordingly. But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee or as a partner.

[107] His Lordship went on to add:

> ... It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership.

[108] Similarly, just because the first defendant is now being paid fees instead of profits does not change the true and real nature of his relationship as a partner of the second defendant. Megarry J recognised that the provision of salary and for the ownership of capital were 'not the usual provisions to be found in a partnership agreement; but I do not think that they or anything else denature the agreement'. His Lordship found that the 'absence of one possible

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head of prima facie evidence' that the plaintiff shared the profits did not negatived the other evidence of partnership including a positive finding that the conduct of the parties after the critical date of the agreement 'fully accorded with the concept of partnership as recorded in the 1968 agreement'.

[109] This decision was applied in *M Young Legal Associates Ltd v Zahid Solicitors (a firm) and others* [2006] EWCA Civ 613. The Court of Appeal similarly had to deal with this question of salaries partners, whether they should be liable jointly with the other partners to creditors of the firm. The Court of Appeal also answered this question in the affirmative. Wilson LJ was of the view that a person who was paid a specified sum for work to be done on behalf of the firm was not precluded from becoming a partner.

[110] Therefore, contrary to DW1's oral testimony on the first defendant's change of intention, the evidence show that the first defendant did not in fact, see it through. The first defendant's contention would require the court to ignore the JVA and the supplemental agreement which were singed together with the PMC; as well as the parties' subsequent conduct.

[111] Hence, the first defendant's claim on its change of status as partner in the JV or that the partnership had been dissolved or terminated by the collaboration agreement is without merit. The true or real nature of the consortium or JV comprising the first and second defendants is on the facts and in law, a partnership; and it remained so despite this change of intent.

[112] Aside from the fact that these agreements were again signed by DW1 for the first defendant, the contents of these agreements merely serve to rearrange details of the same matters already covered in the JV MOU and the addendum. I am of the view that all these additional clauses do not alter the fundamentals of the relation as a partnership under the eyes of the law as the object remained common and constant.

[113] In fact, cl 1B of the JVA expressly provided that the parties be 'jointly and severally liable' to the plaintiff:

> The Parties hereby agree that the said Contract shall be performed and completed by them as a J.V. subject to the terms and conditions of this agreement. The Parties hereby agree that they shall be jointly and severally liable to the Employer for the performance of this Contract.

[114] While the JVA may have now appointed the second defendant as the 'Managing Partner', that is the 'legal authorised representative to sign any other documents relating to the project and the said Contract'; and the establishment of an 'Operating Committee' comprising representatives of the parties which

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was to have 'complete power and authority of the JVA to carry out the project'; the object of the JV remained the same, that is the common business of the project.

[115] The change of the principal place of business to 'Lot 2, Jalan Utas 15/7, Shah Alam Industrial Estate, 40000, Shah Alam, Selangor, Malaysia' also does not alter anything. The name of the JV remained as 'Bentini-NF Energy JV'. This JVA still contained what are in essence, partnership arrangements between the parties.

[116] This conclusion is not affected by the provision in the JVA that the JVA was 'not to be interpreted or construed so as to create any permanent partnership, permanent JV, or other relationship permanent in nature between the Parties'. This is because the 'agreement is entered into for the sole purpose of performing the said Contract and additions thereto and modifications thereof, and for no other purpose'. This object of the business remained common, constant and unwavering.

[117] I observe that the parties had further reserved their 'right to carry on their individual business for their own benefit in any area or geographical location'. Such arrangement is common; that parties form partnerships and many other varieties of relationship in the conduct of business. The general constraint being some measure of prohibition on competition.

[118] However, such latitude or freedom that parties here had allowed one another does not alter the fact that the JV is, for all intent and purpose, a partnership with all its attendant rights, duties and obligations recognised under the law.

The procurement agreement and 45 sell and buy agreements

[119] Then, there are the procurement agreement and the 45 sell and buy agreements signed with the JV. If there were any changes to the basic structure of the JV, it should have been reflected in these agreements. As it is, these agreements were signed with the same arrangements and understandings as found in the JV MOU, addendum and the letter of award.

[120] From all these documents, there is no suggestion that the joint venture between the parties was a mere joint venture without the attending considerations one generally finds in a partnership. If the joint venture was a bare relationship of separateness between the first and second defendants, it would be fair to say that arrangements would have been put in place to deal with their respective accountability and liabilities.

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[121] As it is, there is evidence to the contrary. In fact, the Minutes of technical clarification meeting as well as the JVA provided for the several liabilities of the parties to the JV. This agreed term carries the clear agreement of the first defendant to be severally liable in the event of any breach. To my mind, these matters are consistent with the first defendant's capacity as partner with the second defendant in the JV. DW1's explanation on the reasons for this change of intent insofar as the partnership is concerned is therefore not tenable.

[122] As a corollary, any change of intent of the partners to no longer maintain that relationship must be notified to third parties. Otherwise, parties such as the plaintiff who deal with the partnership after this purported change are entitled to assume and treat all the members as partners. Such a reading can be gleaned from s 38 of Act 135 which provides:

> (1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

[123] Subsection (2) provides for a *gazette* notification as being sufficient notification of this change. No evidence of this has been offered by the first defendant. I agree with the plaintiff that in such circumstances, it is entitled to treat the first defendant, its apparent member or partner, as still being a member or partner of the JV.

CONTINUING TO HOLDOUT AS A PARTNERSHIP

[124] In any event, even if I am wrong, and that the partnership did come to an end with the collaboration agreement, I nevertheless agree with the submissions of the plaintiff that the parties, especially the first defendant nevertheless continued to hold out to third parties such as the plaintiff that it is still in partnership.

[125] This comes about from the first defendant's own awareness and knowledge that it was indeed in a partnership to start with; that it wanted to bring that to an end completely because the 'financial risk' to the first defendant 'had become unacceptably high'. Yet, it did nothing in relation to third parties such as the plaintiff and even Petrodar, who in good faith had contracted with the JV, when it sought to bring that relationship to an end. There was no notification to the plaintiff of this dissolution or revocation of the partnership.

[126] Holding out can take a variety of forms; it may be expressed, implied, oral, in writing or a combination of these forms. This is provided under s 16 of Act 135:

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> Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself, to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with knowledge of the apparent partner making the representation or suffering it to be made:
>
> Provided that where, after a partner's death, the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death.

[127] The plaintiff has suggested that liability can be imputed where there is a failure to notify of such a revocation, that such a revocation is in effect a 'secret revocation between the parties inter se'. It cited the House of Lords decision in *Scarf v Jardine* (1882) 7 App Cas 345 and the Australian decision of *Brundell v Alexander* (1886) 12 VLR 908 in support.

[128] Lord Selborne in *Scarf v Jardine* opined that the principle of law for finding this liability is 'incontrovertible' and it is that of 'estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation'. His Lordship recognised that 'in partnership there is agency — one partner is agent for another; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency and has held it out to others, they have a right to assume that it continues until they have notice to the contrary'.

[129] There is no evidence that the plaintiff was aware of these changes in the JV or that the first defendant had informed of such changes. In the supplemental agreement, the first defendant authorised the second defendant to act on behalf of the JV. With this specific authorisation, it cannot be denied that the first defendant had knowingly suffered the second defendant to represent the first defendant as partner of the JV.

[130] Apart from that, the plaintiff cited a string of incidents and events in support including arbitration proceedings that the JV was involved in. This can be found in its written submissions. Having examined those incidents, I agree.

[131] Despite this purported change which allegedly took place around the time of the collaboration agreement which is 18 July 2004, letters continued to be sent to Mr G Cavicchi. The letters sent by Petrodar related in some instances to matters that came up during the technical proposal clarification meeting on 12 May 2004 — see Item 4.0 of discussion relating to tax exemption. These

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letters stretched over a period of time that was long past the date or time of the purported change of intent. These letters were sent from as early as 9 August 2004 to as late as 5 July 2005.

[132] These letters included matters concerning the plaintiff (for example arrangements for direct payments to the plaintiff) where there is no intimation whatsoever of any change in intent on the part of the first defendant. In fact, as late as 23, 25 June and 5 July 2005, Petrodar was still dealing with the first defendant at an address in Rome, Italy as opposed to the earlier address at 'Faenza, Italy'. Amongst the recipients for the first defendant was Mr G Cavicchi who appeared to have received these letters without complaint.

[133] Even in 2006 (see earlier chronology), specifically a letter dated 10 May 2006 which was sent by the plaintiff but copied to DW1 and which the first defendant had received, the first defendant continued on its path of silence, not enlightening the plaintiff of this purported change. The plaintiff's letter was in respect of the debts due and owing by the JV.

[134] If it was indeed true that the first defendant no longer had any dealing as partner, surely it would have been reasonable to expect the first defendant to inform the plaintiff that it was not liable; or that the plaintiff should be dealing with the second defendant and not, the first defendant. Instead, it admittedly kept silent which further fortifies the court's inference that there was indeed a partnership between the first and second defendants.

[135] Such evidence is consistent with and supports the allegation that the first defendant has intended, allowed, knowingly suffered and deliberately led the plaintiff to believe that the partnership of the JV was still in existence.

[136] I agree with the plaintiff that if this was not so, it would have been reasonable to expect the first defendant to immediately write to alert or advise such important parties as Petrodar and the plaintiff of the what they now claimed to be the correct status of the JV. I agree too, with the plaintiff that this persistent inaction is consistent with the conclusion that the partnership in the JV was indeed very much in existence.

[137] The plaintiff has further referred to the cause papers in related suits, namely the 687 Suit and the 790 Suit which were initiated by the first and second defendants. Those suits were premised on the allegation that the various agreements made between the parties were illegal money lending transactions (687 Suit); and for damages for breach of agreement (790 Suit).

[138] In both suits, the first and second defendants, as the plaintiffs were represented by the same firm of solicitors, Messrs GH Tee & Co. The early

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interlocutory proceedings here are also relied on in further support of the contention that there has been a substantial measure of holding out by the first defendant that it is a partner in the JV. The plaintiff has gone into substantial details of the various steps and acts taken by Messrs GH Tee & Co on behalf of its clients at the material time.

[139] It is the plaintiff's claim that the first defendant never suggested that it was not a party to the agreements in question in any of these cause papers. Instead, it continued to hold itself out or it knowingly suffered itself out to be held as a partner in the JV. The pleadings made no distinction between the first and second defendants. Further, this choice of the same firm of solicitors to act including in the early interlocutory proceedings (the first defendant subsequently changed solicitors to the present firm), indicate a measure of studied moves in strategy in order to allow the first defendant to take its present arguments of non-partnership and non-party.

[140] In response, the first defendant claimed that it had never instructed these solicitors to act for them in those two suits. The appointment was only for a limited purpose of challenging and/or setting aside of the notice of the writ out of jurisdiction and for no other purpose, suit or proceedings. Mr GH Tee (PW4) was called to testify but gave no helpful evidence as he claimed solicitor and client privilege. He was however, never asked about this specific matter.

[141] After examining these cause papers and the correspondence exchanged between counsel and after taking into account the actions of the then solicitors, I agree that the conduct of the first defendant, particularly in engaging the firm of Messrs GH Tee & Co first and who took out a setting aside application with the supporting affidavit being filed by Mr G Cavicchi merit these conclusions drawn by the plaintiff.

[142] The decision to distance itself from this firm of solicitors and to disavow the actions taken by counsel thus far can only be inferred to be afterthoughts and decisions of strategy in response to this suit. If indeed the first defendant was not a partner or a party to the agreements that have been fully pleaded in the statement of claim and amended statement of claim, it would have been reasonable to expect the issue of privity of contract to be a foremost plea of defence. The cause papers continue to refer to the first and second defendants as 'Trading as Bentini-NF Energy JV'. This indicates the existence of and thereby the true nature of the JV was not in issue.

[143] I therefore, agree with the plaintiff that the first defendant's actions effected through its solicitors in the name of Messrs GH Tee & Co are further instances of holding out on the part of the first defendant as partners in the JV.

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Together with all the evidence examined thus for amply illustrate the conduct of the first defendant in continuing or following to be held out as partner in the JV.

WAS THE FIRST DEFENDANT EVER A PARTY TO THE PROCUREMENT AGREEMENT AND THE 45 SELL AND BUY AGREEMENTS?

[144] Moving to the next question as to whether the first defendant was a party to the agreements signed with the plaintiff. The parties to those agreements are 'The Consortium of NF Energy Sdn Bhd ... and Bentini S.p.A ...' with the plaintiff. The person who signed on behalf of the consortium was one Chan Hung Fei. He signed as 'authorised signatory'. He signed in such capacity for all 45 sell and buy agreements. His authority is not in dispute.

[145] The first defendant argued that the material events which led to the signing of the 45 sell and buy agreements took place during a critical time frame of three intense weeks of negotiations in December 2004 culminating in the plaintiff's issuance of the letter of offer dated 21 December 2004 in respect of the procurement agreement and the subsequent signing of the letter of acceptance on 22 December 2004. Those events are said to merit close scrutiny.

[146] Prior to the issue of the letter of offer, the parties met on 2 December 2004 to discuss the procurement and logistics arrangements. The authorised representative of the JV attended. After these arrangements had been agreed, the JV wrote to Petrodar for approval of these agreements with the plaintiff on 7 December 2004; and on 10 December 2004, it secured the requisite approval.

[147] The first defendant maintained that at the meeting of 2 December 2004 held at the third defendant's office at Shah Alam, none of its representatives attended. Instead, other than the plaintiff's representatives, the attendees were representatives of the second and third defendants.

[148] The purpose of the meeting was to negotiate and clarify the terms of the proposal submitted by the JV including the JV's requirement of LCs as well as a proposal on logistics and expediting of payment by the plaintiff to the JV. This is evident from the testimonies of PW1 and PW3. It relied on the evidence of PW1 who is said to have agreed that the first defendant was not involved in the matters discussed. In fact, PW3 went on to say that the first defendant was not even aware of the meeting.

[149] The approval of the minutes by the second defendant's representative and the non-inclusion of the first defendant in correspondence between the

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parties are said to further confirm that the consortium was in effect just the second defendant. This extended to the letter of offer and the letter of acceptance which were never addressed or copied to the first defendant.

[150] Next, the first defendant relied on the role of the third defendant. It claimed that since the bank account was opened using the third defendant's name and that since the third defendant had agreed to bear the liquidated ascertained damages ('the LAD'), warranty and non-performance, then the first defendant was not involved in these agreements with the plaintiff.

[151] In addition, the first defendant found that the plaintiff's internal board paper also showed that the plaintiff was evaluating the second defendant and not the first defendant. In the paper, the party identified as being responsible for compensation and/or making payment to the plaintiff was the second defendant. This was reflected in the plaintiff's action in sitting down to discussions on settlement. These were held with no participation or involvement of the first defendant.

[152] Lastly, the first defendant argued that the plaintiff ought to have conducted a due diligence before the agreements were made. The plaintiff's failure to verify against information which was in the public domain would have confirmed the first defendant's interpretation of the conditions and circumstances.

[153] In light of all this evidence and the inconsistencies of description of the consortium (as 'NF Energy Sdn Bhd'; 'The Consortium of Bentini S.pA and NF Energy Sdn Bhd'; 'BNFE'; and 'Bentini-NF Energy JV' or 'NF Energy-Bentini JV'), the first defendant submitted that the alter ego of the consortium was the second defendant and not, the first defendant.

[154] In relation to this issue, one must bear in mind that running through all the agreements, be it the JV MOU, addendum, JVA or the supplemental agreements is this common thread of appointing a single person authorised to represent and make decisions which the consortium of partners. Initially, it was the second defendant then the first before it finally lay in the arms of the second defendant. This is material as the agreements with the plaintiff were signed by the second defendant.

[155] It is observed that the first defendant does not deny the contents of the collaboration agreement. It merely seeks to rely on these agreements to support its case that these agreements show that the parties were not in partnership.

[156] But, it is not the form of the agreement that determines the real nature of the bargain or, in this case, the relation between the parties. This will extend

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to any system of filing or record documentation maintained by any of the parties. The first defendant had suggested that some significance should be placed on the designation of the minutes for the meeting of 2 December 2004 as 'Report No. NF-001'. The law journals are replete with case law from our highest court on the principle of construction of contracts in order to determine the real intention of parties. I have also touched on this earlier when examining the decisions of *Stekel v Ellice and M Young*.

[157] Now, having not disputed the contents of these agreements, at the very least, the court is entitled to infer that the first defendant is not disputing that the second defendant (and thereby Chan Hung Fei) was indeed the authorised signatory of the parties. This is what cl 10 of the supplemental agreement say:

> Save as expressly stated in the agreement herein, BNT confirms that from the date of this agreement, BNT shall not have any authority to act for or to enter into any agreement whatsoever with any party to bind NFE or BENTINI-NF ENERGY JV save and except with the prior approval in writing by NFE. In failing of the above, BNT shall be held solely responsible for such act or agreement entered into by BNT and BNT shall be liable, save harmless, indemnify and keep indemnified NFE against all actions claims proceedings costs losses whatsoever resulting directly or indirectly from BNT's breach of the aforesaid.

[158] I agree with the plaintiff that the second defendant is not obliged to inform the first defendant of its acts done on behalf of the JV. The first defendant cannot cherry pick those clauses or terms that it feels best suits its arguments; while at the same time, ignore the rest of the clauses that glaringly tell their claim — that the first defendant had agreed that the second defendant's acts and decisions will bind the first defendant.

[159] That being so, the fact that the first defendant did not physically put pen to paper along the dotted line is irrelevant, so long as the representative authorised to do so did. Here, the second defendant had signed for the JV. The first defendant is therefore is a party to the agreements made with the plaintiff and it is bound under those agreements.

[160] In any case, an examination of the evidence before the court reveal that the second defendant was acting very much in line with its capacity as 'Lead Party'. In its letter written on a letter head of the JV, it is quite clear that when the JV sought Petrodar's approval in relation to the plaintiff, it was on the strength of the JV. Mr G Cavicchi was copied in on that correspondence.

[161] PW1 who attended the meetings on behalf of the plaintiff testified that the contracting party who attended the meeting and who signed the contract was 'Bentini-NF Energy JV'. While the identity of the lead party may have changed, the consortium of the JV was a constant that remained unchanged. It

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is the same entity that was awarded the project by Petrodar; and it was the same which executed and completed the project and contracted with the plaintiff.

[162] In all the documents discussed, exchanged and signed between the parties, PW1 testified that he was dealing with Bentini-NF Energy JV. The representative of lead party may have been the second defendant but the plaintiff, in good faith believed that it was dealing with the partnership of Bentini-NF Energy JV.

[163] This is reflected in the plaintiff's paper to its board of directors for approval. At p10 of bundle 1, the plaintiff pointed out that the 'leading partner in the consortium is NF Energy'. It observed that the second defendant 'has been in the business for 8 years and well known in the construction, property development and provision of EPCC services' (see p 15 of bundle 1).

[164] These statements must have been its understanding following the meeting with the defendants on 2 December 2004. It would appear that the plaintiff knew that it was contracting with the second defendant as a front or lead for the larger body known as the 'consortium' or 'JV'; and not the single entity of the second defendant.

[165] Following Petrodar's approval, the parties met again on 21 December 2004 and this was followed by the plaintiff's letter of even date containing its revised offer. PW3 signed the acceptance on behalf of the JV or consortium — see p 28 of bundle 1. Again, this use of the term 'Lead Party' illustrates the awareness and acknowledgment of all parties that the JV was a consortium of partners.

[166] All this, in my view, show that the parties had arranged and conducted themselves confidently and well such that dealings negotiations and the like did not have to involve everyone all the time. The first defendant's absence at these meetings or negotiations do not sound any alarm bells.

[167] On the contrary, they are indications of the confidence and arrangements made by the first defendant with its other partners. Given that the JV never informed Petrodar at any time of its internal changes or alert the plaintiff of the same when contracting with the plaintiff, the fact that the plaintiff liaised only with the second defendant and with certain persons within the second defendant does not detract from this conclusion that the JV subsisted as a partnership comprising the first and second defendants.

[168] This is consistent with the provisions of s 7 of Act 135 which provides that the acts of a partner binds the firm or partnership and his partners:

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> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular manner, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

[169] Since the authority of Chan Hung Fei in signing as 'authorised signatory' in the 45 sell and buy agreements is not in dispute, and there is no suggestion that the plaintiff was aware that the second or third defendant were not authorised to act for the first defendant, then, the acts of the second defendant conducted through Mr Chan and personnel such as PW3, bind the first defendant.

[170] I disagree with the first defendant that these references were merely stylised references to the consortium. The parties agreed to combine their expertise and that did not change. The second defendant may have been very much in the forefront but the first defendant was very much behind the second defendant at all times. This method and manner in which the first and second defendants conducted themselves continued through the default phase. The absence of the first defendant mattered not a jot.

[171] Here, I must touch on the witnesses. The first defendant invited the court to take cognisance of DW1's language limitations which he claimed to have limited the 'spectrum of nuances that he was able to convey in his responses'.

[172] With respect, I disagree. At no time was DW1 hampered by language. DW1 had the assistance of interpreters (which he himself had sourced) who had ably translated the questions posed to him in Italian, the language that he chose to testify in. At no time during his testimony did he indicate that he was having difficulties of any kind or degree; or that he was being misunderstood; or that he wanted the assistance of a different interpreter.

[173] It is my judgment that DW1 actually understood some English but was not comfortable or confident testifying in that language. Frequently, he was able to respond even before the questions were even translated to him. Where the translation did not convey what he had said, DW1 himself corrected the translation.

[174] I find the plaintiff's witnesses honest, credible and knowledgeable of the facts as compared to the first defendant's witness. Their evidence is reliable, sufficient and adequate and their oral testimonies consistent with the

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documentary evidence. I find that DW1 and thereby the first defendant, knew what was happening on the ground at all times.

[175] In a venture or a project of this magnitude, especially in value, where the first defendant sent its best and most senior as reflected in the persons of Gaetano Cavicchi and DW1 himself, it is most improbable that the intricacies and workings of the consortium or the JV, and more significantly, the chain of command and the position of responsibility and legal liability are not properly and clearly identified and understood. Hence, the meeting with Petrodar and where the first defendant quite clearly recorded that it would be jointly and severally liable with the second defendant.

[176] Hence, in answer to the questions posed, I find on the total factual matrix which is borne out by the contemporaneous documentary evidence, there is ample evidence to prove that the first defendant was indeed a partner and a party to the agreements made with the plaintiff.

[177] These agreements for the procurement of the necessary equipment that the JV needed were undoubtedly used towards the successful completion of the project. The elements for finding the existence of a partnership are satisfied. The parties had a relation in this JV where they had a business in common, namely the project and that business was with a view of profit. That position never changed whether contracting with Petrodar or the plaintiff.

DID THE PROCUREMENT AGREEMENT AND THE 45 SELL AND BUY AGREEMENTS CONSTITUTE ILLEGAL MONEY-LENDING TRANSACTIONS?

[178] The first defendant further argued that the agreements with the plaintiff are void and unenforceable by reason of violations of the Moneylenders Act 1951 ('Act 400'). Learned junior counsel for the first defendant submitted that since the transactions underlying the procurement agreement and thereby the 45 sell and buy agreements are in effect money lending, these transactions are void and unenforceable because there was no evidence to show that the plaintiff was licensed to lend money. Since the transactions are void for illegality, then the plaintiff was not entitled to seek recovery for any losses arising out of or connected to these transactions.

[179] Having examined the relevant law and having evaluated the facts, with respect, I disagree.

[180] First of all, the transactions entered are not money lending transactions at all as the elements spelt out in s 2 of Act 400 are absent. Under s 2, the following three definitions must be given due regard:

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A 'moneylender' means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him;

'moneylending' means the lending of money at interest, with or without security, by a moneylender to a borrower;

B 'moneylending agreement' means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender.

[181] Act 400 was amended vide Moneylenders (Amendment) Act 2011. The C sell and buy agreements were executed between 2004 and 2005. I agree with the plaintiff that regardless whether under the amended or pre-amended legislation, the provisions of Act 400 do not apply.

[182] This court had occasion to examine the provisions and application of D Act 400 in *Zalwadi Farms (M) Sdn Bhd (formerly known as Innovasi Permai Sdn Bhd) v Prudents Gateway Sdn Bhd & Ors* [2011] MLJU 870; [2011] 1 LNS 1108. In that decision and following the Court of Appeal decision in *Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd* [2006] 1 MLJ 158, this court said:

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[16] First and foremost, although this may already be quite obvious, there must surely be a borrowing by one party and a lending to the other party. That borrowing and lending must also be of money. After all, Act 400 is legislation to regulate and control the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and for matters connected therewith. The Act F does not envisage an agreement to borrow and lend money's worth. It has to be the borrowing and lending of money. Also, money that is borrowed and lent must change hands between these principal parties or to the benefit of these principal parties. This view is regardless of whether one is looking at Act 400 before it was revised or amended. Act 400 regulates and controls the business of moneylending G through a system of licensing and that system has not altered or shifted in any manner whatsoever with the amendments through the years. Despite some amendments, s 15 of Act 400 remains intact in providing that:

> 15 No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

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[17] This construction and interpretation is also apparent from the definition of 'moneylender' in s 2. The definition here is definitive in its interpretation of a 'moneylender', that it 'means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him'. There is therefore a need for there to be a lender and a borrower.

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[183] Before a transaction may be considered a moneylending transaction under Act 400, the first defendant will have to show:

(a) that there is borrowing from one party and lending to the other party;

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(b) the borrowing must be in the form of money; and

(c) the consideration for the act of borrowing is for a larger sum being repaid to the lender.

[184] In that decision, I had also cited the Court of Appeal's decision in *Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd* [2006] 1 MLJ 158. The Court of Appeal had expressed concerns over how perfectly legitimate or genuine advance arrangements were being displaced as unenforceable moneylending transactions, recognising that it is actually quite 'commonplace in corporate environment' for such arrangements (not unlike those presented here) to be made:

> This is therefore not a case of the respondent carrying on the business of money lending on the facts. It is commonplace in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies on a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure money lending within the Moneylenders Act 1951 ('the 1951 Act'), then no shareholder or director will ever be able to recover genuine advances albeit bearing interest made to his or her company during a time of want. Business in the corporate sector as we know it will come to a literal standstill and companies instead of looking to survival will face extinction.

[185] On the facts in this case, there is no money lending activity at all. What we have are agreements for the sale and purchase of equipment that the JV needed for the execution and completion of the project. An examination of the terms and conditions of the 45 sell and buy agreements will readily yield this answer.

[186] In any case, the plaintiff is not in the business of money lending. It is a company involved in procurement activities and this was explained by PW1. He told the court that the plaintiff was 'the procurement arm of PETRONAS. Its role in the PETRONAS Group was to procure supplies and equipment for all PETRONAS companies and MJSB was able to carry out such procurement on favourable terms due to economies of scale'.

[187] The Court of Appeal in *Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd*, at p 162 had also opined:

> In my judgment, the 1951 Act, by its spirit and intendment is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It is certainly not designed to apply to fit patterns such as those that exist in the present instance.

[188] Similarly, I do not find the fact pattern in this case designed or unwittingly of the nature and character as suggested by the first defendant.

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Even the Federal Court had cautioned in *Ngui Mui Khin v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9, at p 12 that it is not every money lending transaction that is illegal and unenforceable:

> At the outset we wish to observe that the Moneylenders Ordinance 1950 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject matter of the Ordinance and must comply with the provisions on pain of being declared illegal and unenforceable by the court. He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. To prove business requires some sort of continuity or system or repetition of similar transactions ...

[189] Here, there is simply no borrowing and lending and certainly not of money. This argument of the first defendant is therefore without merit and must be rejected.

HAS THE PLAINTIFF ESTABLISHED AND PROVED ITS LOSS?

[190] As for losses, the plaintiff is relying principally on the multiple occasions of unreserved admissions of the second defendant that was earlier referred to having occurred during the 'default stage'; and that these admissions bind the first defendant. Further, the plaintiff relied on the evidence of PW2 who testified that the loss and damage is to be found in the two Attachments 1 and 2 in bundle 55.

[191] Having heard and having examined the evidence and in view of my earlier finding of the existence of partnership, I agree with the submissions of the plaintiff in this respect. Since the first defendant has not notified of any change of its intent, the acts of the second defendant continue to bind all the partners in the JV.

[192] In fact, the doctrine of estoppel operates against such attempts to avoid liability. This will include any admissions made, be it orally or in writing. Further, it is noted that previous payments to the plaintiff have been against invoices issued in the name of the JV and there has never been any corrections.

[193] The plaintiff has identified the letters sent by the second defendant where the admission on the debt due was unreserved and unequivocal. For example, in response to the plaintiff's demand, the second defendant clearly stated in its letter dated 17 November 2005 that it was not its intention to delay payment and that it was making every effort ('doing our best') with Petrodar to expedite the plaintiff's payments.

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[194] In particular, there is this letter dated 15 March 2006 sent by the second/third defendant where the JV had acknowledged that there was a sum of approximately USD50m (the exact amount to be reconciled and confirmed by both NFCB and MJSB) still outstanding in respect of the procurement and logistics services. The second defendant expressed its awareness of the plaintiff's concerns over the status of payment and it reassured the plaintiff that it was not evading its obligations towards the plaintiff.

[195] There were also meetings held between the plaintiff and the JV representative and where minutes of these meetings were kept on the matter of outstanding payments. At such meetings, there were further admissions of the debt made by the JV representative. There is also evidence of the JV making arrangements to assign payments to the plaintiff. All these were signed by PW3.

[196] Although the first defendant had been advised of the debt through the plaintiff's letter of demand (see earlier chronology of events), it kept silent. It did not protest against accountability or quantum. Actually, the issue of liability or quantum insofar as these debts are concerned have not been seriously challenged. At the trial, PW2's testimony was given confidently and unshaken.

[197] In any event, I am satisfied that the sum claimed is due and owing to the plaintiff. It must be borne in mind the nature of these debts; they arise from the 45 sell and buy agreements. The equipment comprising of rotary screw pumps and drivers which are necessary for the building of the pump stations or facilities in Sudan have all been supplied and utilised by the JV who have in turn gone on to complete the project successfully. There is no suggestion that there was any failure to deliver or any defect in supply.

[198] In the circumstances, this issue is also answered in the plaintiff's favour.

CONCLUSION

[199] On the totality of evidence before the court, it cannot be denied that the real and true nature of the Consortium of Bentini-NF Energy JV was that of a partnership. The partners came together for the single and common business of securing the Petrodar project and to profit from such a business. The personal attendance by such senior personnel of the first defendant, not least DW1 himself continuously throughout the relation with the second defendant is testimony of that truth. That relation endured despite the changes in management and financial details as the common business remained the same.

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[200] With such overwhelming evidence adduced by the plaintiff, I am satisfied that the plaintiff has proved its claim on a balance of probabilities. The claim is therefore allowed according to paras 17(i), (ii), (iii) (Euros) of the statement of claim together with costs of RM204,974.65 which I shall round up to RM200,000.

Claim allowed with costs RM200,000.

Reported by Kanesh Sundrum